XI-HC—78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

Criminal Appeal No.647/2005

[Single Bench: Hon'ble Mr. Justice Dhirendra Mishra]

APPELLANT (IN JAIL) — Bharat Lal @ Bharat Singh Thakur, S/o Nathu Singh Thakur, aged about 20 years, R/o Ramsagar Para, Bhatapara, Police Station-Bhatapara, Distt. Raipur(C.G.)

Vs

RESPONDENT — State of Chhattisgarh, through -Station House Officer, Police Station Bhatapara, Distt-Raipur (C.G.)

29.11.2007

Shri Anil Gulati, Advocate for the appellant.

Shri Arun Sao, Govt. Advocate for the State.

Heard.

This criminal appeal is directed against the judgment of conviction and order of sentence dated 21st July, 2005 passed in Sessions Trial No.183/01, whereby the learned 2nd Additional Sessions Judge, Balodabazar has convicted the appellant under Sections 450 & 376(1) of the IPC and sentenced him to undergo R.I. for 7 years and to pay fine of Rs.500/- and in default of payment of fine additional R.I. for 3 months on each count. Both the sentences have been directed to run concurrently.

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -2-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

Case of the prosecution, in brief, is that on 12.7.2000 at about 1:30 p.m., the prosecutrix (PW-1) was residing at Bhatapara with her parents, her parents had gone to work in their hotel and she was sent by them to home for changing her clothes as she was to go to Mohgaon. At that time while she was alone in her home and was collecting her luggage, the appellant came inside the house, caught her arms, made her lie on the cot, gagged her mouth with the help of handkerchief and committed forcible sexual intercourse. While he was engaged in the intercourse, the brother of the prosecutrix Tribhuwan (PW-2) reached there and caught him. However, he was able to escape and thereafter report of Ex.P-1 was lodged by the prosecutrix.

During investigation, the prosecutrix was sent for medical examination to the Primary Health Centre, Bhatapara, where Dr. Usha Gupta (PW-9) examined her and gave the report of Ex.P-12A. The bed sheet, vaginal slides & underwear of the prosecutrix seized during investigation were sent for chemical examination to the Forensic Science Laboratory, Raipur and the report of FSL is Ex./P-14.

After completing investigation, charge sheet was filed in the Court of Judicial Magistrate 1st Class, Balodabazar

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	and the same was received on transfer for trial by learned Additional Sessions Judge. During trial, the prosecution examined 9 witnesses in all, thereafter statement of the accused was recorded in which he denied the evidence appearing against him in the prosecution case and pleaded innocence and false implication. The trial Court after hearing learned counsel for the respective parties, has been convicted and sentenced the accused as mentioned in Para-1 of this judgment.	
	Learned counsel for the appellant submits that from perusal of the deposition of the prosecutrix it is manifestly clear that the prosecutrix was acquainted with the appellant and she was aged more than 16 years on the date of the incident. The incident allegedly committed at 1:30 p.m. in the dense locality inhabited by numerous persons. The prosecutrix did not raise alarm neither she offered any resistance against the forcible rape. Referring to the detailed cross-examination of the prosecutrix, it has been argued that the conduct of the prosecutrix clearly shows that she was the consenting party and the report was lodged only because her brother came to the place of	

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incident and saw the appellant and the prosecutrix in a compromising situation.

On the other hand, learned counsel for the State has supported the impugned judgment and contended that the version of the prosecutrix is duly corroborated from the statement of her brother, who is in fact an eye witness of the incident. Her version is also corroborated from the medical evidence as Dr. Usha Gupta (PW-9) has noticed rupture of hymen and presence of blood on her vagina & thighs and she has categorically opined that the prosecutrix was subjected to intercourse. He also argued that the FSL report is also positive, as human sperm has been found in the vaginal slides, underwear and bed sheet and even blood has been found in underwear and bed sheet.

I have heard learned counsel for the parties. I have perused the record as also the judgment of the trial Court.

Conviction of the appellant is based on the statement of the prosecutrix (PW-1) and her brother Tribhuvan (PW-2). It is also based on the positive medical evidence of Dr. Usha Gupta (PW-9).

So far as the age of the prosecutrix is concerned, it is undisputed that the prosecutrix was more than 16 years

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old on the date of incident and the Court below has also recorded this finding. Even sexual intercourse on the date of the incident has also not been disputed. The only question for consideration is whether from the evidence available on record it can be inferred that the prosecutrix was the consenting party and whether the report was lodged only because the incident was witnessed by brother of the prosecutrix.

The prosecutrix (P.W.1) has deposed at the time of incident at about 1:30 p.m., when she was present in her hotel with her parents, her parents gave her key of her home and asked her to make preparation for going to her maternal uncle's house, whereupon, she reached her home. When she was arranging her clothes, accused Bharat came and caught her hand. When she shouted, the appellant threatened her and inserted handkerchief in her mouth and thereafter took out her underwear and robbed her honour after undressing himself. At the time when the accused was putting on pant and underwear, she resisted, however he caught her hands and when she tried to shout, he put cloth in her mouth. When the accused was committing sexual intercourse, the gate of the house was open and at that

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आदेश पत्रक (पूर्वानुबद्ध)

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time, her brother Tribhuvan came there and slapped the accused, whereupon he fled from there. In Paragraph 3, she has stated that she had seen the accused coming to other's hotel before and therefore she was recognizing him from face. In Paragraph 2 of her cross-examination she has admitted that they reside in the upper floor of the house of Chagan Verma and the owner of the house resides in the ground floor. Houses of around 150 people are located nearby and it is beside the main road of Bhatapara. At the time of incident, the wife of Chagan was present in her home and she was sleeping in her front room. She has expressed her ignorance about the accused sitting in the nearby hotel when she left for her home and that he followed her up to her home. The other suggestion of the defence that the prosecutrix had sex with her consent has been denied. In Paragraph 11 of her cross-examination she has admitted that she did not pinch the accused. She has further admitted that at that stage she remembered that the gate was open, however she has denied the suggestion that she went to close the door. She has further stated that when the accused was engaged in the act, her brother

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आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -7-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

came there. However she has denied that she became frightened on his arrival.

Tribhuvan Verma (PW-2) has deposed that he went to bring the prosecutrix to his home. As soon as he reached near the door, he heard the murmuring of his sister, when he entered the house he saw that the appellant was committing rape with her after inserting a handkerchief in her mouth. On seeing him, the accused got frightened. He slapped the accused, however, he escaped after pushing him and at that time the appellant was not putting on any cloth below his waist and he was naked. In Paragraph 2 of his cross-examination he has admitted that several persons reside in the vicinity. He has further admitted that when he went inside, he saw both of them in an intimate position.

Dr. Usha Gupta (PW-9) has proved the medico legal examination report of the prosecutrix of Ex.P-12A and deposed that on examination she did not find any external injury over the person of the prosecutrix, even on examination of her private part also she did not find any injury, though the blood was oozing from her vagina and blood was present over her thigh. Her hymen was ruptured. She has opined that the prosecutrix was subjected to

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intercourse. However, in the cross-examination she has not given the age of rupture of hymen and has further stated that she could not definitely say whether the blood was due to monthly discharge or because of rupture of hymen. She has further stated that even if the prosecutrix is subjected to intercourse with consent, the hymen is bound to be ruptured.

After close scrutiny of the evidence of the prosecutrix and her brother Tribhuvan Verma, the following picture emerges;-

a. The age of the prosecutrix is above 16 years, whereas the accused is aged about 20 years and the prosecutrix recognizes the appellant since before.

b. That the prosecutrix resides in a densely populated area beside the main road, the time of incident is 1:30 p.m and the house of the prosecutrix is surrounded by the houses of others.

c. On the date of incident also the wife of the landlord Chagan was present in front room of her house. No allegation that the appellant was having

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any deadly weapon which frightened the prosecutrix.

d. The prosecutrix went to her home on the pretext of collecting her luggage to go to village Mohgaon and she was immediately followed by the accused. She did not raise alarm and her explanation that that the appellant inserted handkerchief in her mouth is subsequent improvement over her diary statement and FIR.

e. The prosecutrix was allegedly forcibly undressed and thereafter the appellant after undressing himself committed forcible intercourse. Though there is discrepancy in the statement of the prosecutrix and that of her brother, as the prosecutrix claims that accused did not fully undressed himself whereas the brother of the prosecutrix claims that the appellant was naked down below the waist. There is evidence in the record that the appellant left his underwear while fleeing from the scene of incident. This is not possible unless the accused is fully undressed.

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f. The prosecutrix has inadvertently admitted in the cross-examination that while the act of intercourse was going on, she remembered that the door was open.

g. Her brother Tribhuvan has admitted in his cross-examination that when he entered inside the room he found the prosecutrix and appellant twinned with each other.

h. There is no sign of struggle, as the prosecutrix has admitted that she did not pinch the accused nor she herself sustained any injury over her person.

i. While the intercourse was going on, her brother reached the spot and thereafter report was lodged with the allegation of rape.

In view of the above facts, the story of the prosecutrix that the appellant committed rape with the prosecutrix in the broad day light in densely populated locality when the wife of the landlord was also present in the same house appears to be highly improbable and the version of the prosecutrix in this regard does not inspire

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आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -11-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

confidence. However, the defence of the appellant that the intercourse was consensual may be probablized.

So far as the medical evidence and positive report of FSL is concerned, even if the consensual sex is there, the medical report is bound to be positive.

Therefore, the judgment of the trial court convicting the appellant under Sections 450 & 376 of the IPC and sentencing him to undergo R.I. for 7 years under each count cannot be sustained.

In the result, the appeal succeeds. Conviction of the appellant under Sections 450 & 376 (1) of the IPC and sentence imposed under those sections are hereby set aside and he is acquitted of the above charges. The appellant be set at liberty forthwith, if not required in any other case.

Sd/-
Dhirendra Mishra
Judge

Roshan/Praveen